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Supreme Court, U. S.

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In the
Supreme Court of the United States
October Term, 1998

JOHN H. ALDEN, ET AL.,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Maine

**BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT
OF RESPONDENT STATE OF MAINE**

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QUESTION PRESENTED

Does Congress have the authority under the Commerce Clause to create a state fiscal obligation, such that a private litigant may sue the state for damages based upon not meeting this federal obligation, and abrogate state sovereign immunity from suit in state court in order to enforce this obligation?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondent, the State of Maine. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America.¹ Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in cases concerning the Tenth Amendment, the Eleventh Amendment, the Commerce Clause, and other constitutional limitations on federal power. For example, PLF participated as amicus curiae before this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). PLF has also directly represented parties in litigation raising federalism issues, such as *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), and is involved as amicus curiae in the ongoing litigation in *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), *Pryor v. Reno*, 998 F. Supp. 1317 (M.D.

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Ala. 1998), and *Travis v. Reno*, 1998 WL 871038 (7th Cir. 1998), involving Tenth Amendment challenges to the Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq.*

This case raises a significant and fundamental question of law about the extent of power the Constitution grants to Congress to establish rules for the operation of state governments. Amicus seeks to augment the arguments in the Respondent's brief regarding the proper understanding of the federalist system established by the Constitution. PLF believes its public policy perspective and litigation experience dealing with federalism and the Constitution's enumeration of powers will provide this Court with a broader policy viewpoint than that presented by the parties and believes its broader viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

A probation officer employed by the State of Maine brought suit against the state in federal court seeking overtime pay. The suit was based on the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.*, a federal law enacted by Congress pursuant to its commerce power that, by its terms, applies to the states. During the pendency of the trial, this Court rendered its decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). That case held that Congress may not abrogate state immunity under the Eleventh Amendment for Commerce Clause enactments. *Id.* at 72. Consequently, the Petitioners' federal suit was dismissed for lack of jurisdiction. *Mills v Maine*, 118 F.3d 37 (1st Cir. 1997). The officer then brought suit in state court. The State of Maine asserted its sovereign immunity as a defense. The trial court dismissed the case on this basis, and the Supreme Judicial Court of Maine affirmed. *Alden v. Maine*, 715 A.2d 172 (1998). This Court granted a writ of certiorari to determine whether Maine's state courts have an obligation to enforce federal commerce legislation against the state itself, notwithstanding the principle of state sovereign immunity.

SUMMARY OF ARGUMENT

The Eleventh Amendment specifically refers to the judicial power of the United States. As a result, it cannot, by itself, fully resolve the federalism issues raised in this case. However, this Court has never interpreted the Eleventh Amendment by mechanically tracking the language of the Amendment itself. Instead, this Court has indicated that the Eleventh Amendment memorializes a fundamental principle of federalism. Under this view, the Eleventh Amendment did not create state sovereign immunity from whole cloth. Rather, notwithstanding *Chisholm v. Georgia*, 2 U.S. 419 (1793), state immunity from suit exists as an attribute of sovereignty independent of the Eleventh Amendment.

Thus, the real question in this case is not simply one of court jurisdiction, but of state sovereignty, and the limits placed on federal power by that sovereignty. The issue is: does Congress have the power to unilaterally abrogate state sovereign immunity? The only answer that adequately respects the Constitution's federalist structure is no. In this case, federal encroachment on state sovereignty is twofold: first, by mandating state compliance with federal law through this Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), and second, by forcing state courts to enforce federal law against the states themselves. Contrary to the argument of the Petitioners and the United States, this Court's resolution of the first does not necessarily dictate the result in the second. *Garcia* did not hold that Congress could enforce the FLSA by any means. This Court should resist expanding *Garcia*, and flatly reject *Garcia's* reasoning that this Court has no role in keeping congressional enactments within constitutional bounds.

This Court should hold that the Constitution does not grant Congress the power to abrogate state sovereign immunity. Any other finding would be inconsistent with this Court's recent

federalism pronouncements, as well as result in a significant expansion of federal power under the Commerce Clause.

ARGUMENT

I

THE ELEVENTH AMENDMENT, BY ITSELF, DOES NOT RESOLVE THE ISSUE IN THIS CASE, THOUGH IT ESTABLISHES OUTER LIMITS ON FEDERAL POWER OVER THE STATES

The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment was passed following *Chisholm v. Georgia*, in which this Court held that it could exercise jurisdiction over an unconsenting defendant state at the behest of a private citizen of another state. *Chisholm*, 2 U.S. at 419. As pointed out in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the *Chisholm* decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, 292 U.S. at 325. Though the text of this Amendment is straightforward, this Court has emphatically and repeatedly pointed out that the Eleventh Amendment implies something more than the plain meaning of its words. "We long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. at 69 (citations omitted).

While the passage of the Eleventh Amendment obviated the need for this Court to overturn the *Chisholm* decision, this

Court has since viewed *Chisholm* as "discredited." *Seminole Tribe*, 517 U.S. at 68. That is, this Court has effectively overruled *Chisholm* by recognizing that sovereign immunity is a thing that exists regardless of the strictures contained in the Eleventh Amendment. A state's immunity from suit is not a federally-created right, but an attribute of sovereignty.

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

Monaco, 292 U.S. at 327. An assertion of Eleventh Amendment immunity from suit is something more than arguing a mere formal limitation on the Article III jurisdiction of the federal courts. It is an assertion that the states stand in a special place by virtue of their sovereignty, and thus may not be sued in the absence of consent.

In The Federalist No. 81, Alexander Hamilton elaborated on the principle of state sovereign immunity. In attempting to allay the fears of anti-federalists that Article III, Section 2 (describing the federal judicial power), would allow states to be haled into federal court without their consent, he responded that state sovereign immunity was so fundamental that its expression was unnecessary under the proposed Constitution. As one of the drafters of our Constitution, his thoughts are worth repeating here:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. . . . [T]here is no colour to pretend that the state

governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to compulsive force. *They confer no right of action independent of the sovereign will.*

Alexander Hamilton, *The Federalist* No. 81 (Garry Wills ed., 1982) at 414 (former emphasis in original, latter emphasis added).

In *Seminole Tribe*, this Court's most recent pronouncement on the Eleventh Amendment, this Court established that federal courts may not entertain suits against unconsenting states for alleged violations of federal Commerce Clause enactments. *Seminole Tribe*, 517 U.S. at 72. Viewed another way, this Court held that the Commerce Clause does not grant Congress the power to override the Eleventh Amendment's recognition of state sovereign immunity from suit in federal courts. *Id.*

In the Petitioners' federal case, there is little debate that the federal court's dismissal was proper under this Court's decision in *Seminole Tribe*. But unlike *Seminole Tribe*, the present case requires this Court to establish the scope of state sovereignty in the context of federal legislative power over *state* courts, rather than federal legislative power over *federal* courts. This question is of a different nature. The Eleventh Amendment literally governs "the judicial power of the United States"; therefore, the Amendment itself, and cases arising under it, are technically irrelevant in determining congressional power vis-a-vis the states and state courts. *But see, Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting) (discussing Eleventh Amendment in case dealing with state court jurisdiction). Nonetheless, the Eleventh Amendment is pertinent in this case not so much for its text, but for its context in our federalist system. In short, the Eleventh

Amendment is instructive in determining the scope of state sovereignty protected by the Constitution.

There is no question that the State of Maine has withheld its consent to be sued in this suit brought by its citizens under the FLSA. The question is whether this lack of consent acts as an absolute bar to the suit, regardless of congressional intent to provide a private right of action for damages under its Commerce Clause enactments.² And though the Eleventh Amendment speaks only to the extent of federal judicial power, rather than federal legislative power, it suggests that the federal government itself lacks the power to override state sovereign immunity in any of its branches. The federalism sentiments which prompted Congress and the States to so strongly reject *Chisholm* as to adopt the Eleventh Amendment would be no less offended—or shocked—by the federal overreaching here. It could hardly have been contemplated that our courts would find a congressional power to abrogate a state's sovereign immunity in that state's own courts. This Court should remain faithful to

² In the private right of action provision of the FLSA, Congress states that "any employer" includes "a public agency." 29 U.S.C. § 216(b). Further, "public agency" is defined to include "the government of a State" or "any agency . . . of a State." 29 U.S.C. § 203(x). Federal Courts of Appeal determined that this was sufficient for finding congressional intent to abrogate sovereign immunity under the now-defunct rule in *Pennsylvania v. Union Gas*. *See, e.g., Reich v. State of New York*, 3 F.3d 581, 591 (2d Cir. 1993). *But see, American Federation of State, County & Municipal Employees v. Corrections Department of New Mexico*, 783 F. Supp. 1320, 1323 (D.N.M. 1992) (finding congressional intent to abrogate not sufficiently clear). Because a private right of action against the states requires abrogation of immunity in either federal or state court, it is reasonable to find an intent to abrogate in this language; otherwise, one must make the unreasonable inference that Congress was only providing a private right of action where states consent to suit. Thus, this Court must resolve the case on the constitutional issue, rather than on the basis of a "clear statement" rule. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), and the cases there cited.

those federalism sentiments, and hold that Congress lacks the power under our federalist system to abrogate state sovereign immunity in state court.

II

RESPECT FOR FEDERALISM REQUIRES THIS COURT TO HOLD THAT CONGRESS LACKS THE POWER TO ABROGATE STATE SOVEREIGN IMMUNITY

In *Seminole Tribe*, this Court held that the principle of state sovereignty, of which state sovereign immunity is an attribute, is offended by congressional enactments that force states to submit to federal court jurisdiction. *Id.* at 67-68. It is difficult to imagine that state sovereignty is less offended by the present case, where a congressional enactment forces states to comply with federal dictates, and forces state courts to enforce a federal law against the states by abrogating state sovereign immunity.

Oddly, the root of the present litigation is this Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, which held that the FLSA could be applied to the states without violating the Commerce Clause or federalism. While the present case may not be the proper vehicle for squarely confronting *Garcia*, it does require the Court to reconsider the implications of *Garcia*.³

Prior to *Garcia*, the present case simply would not have arisen. Before *Garcia*, congressional exercises of the commerce

³ The Respondent's Brief in Opposition raised the issue that, should the Court take up the sovereign immunity question, it should reconsider *Garcia*. *Respondent's Brief in Opposition* at 17 n.8. Amicus Curiae National Association of Police Organizations rests its argument largely upon the holding in *Garcia*, *Brief of Amicus Curiae National Association of Police Organizations in Support of Petitioners* at 9-12, and the United States relies greatly on *Garcia* in finding in favor of a private right of action in this case. *See Brief for the United States* at 13-14.

power could not force states to conform to federal notions of how state governments should be operated. But that changed. *Garcia* determined that Congress could indeed require the states, in their capacities as employers, to meet federal employment standards such as those contained in the FLSA. *See Garcia*, 469 U.S. at 555-56. Congress' application of federal labor laws and other federal laws to the *states as states* created the circumstance wherein states could be haled into court by private citizens seeking to recover monetary damages. Thus, *Garcia* made it inevitable that the conflict in this case would arise.

Garcia is also implicated by the fact that, as pointed out by the Petitioners, the United States, and their amicus, the *Garcia* decision upholding the application of the FLSA to the states would be undermined if a private right of action was barred on the basis of state sovereign immunity.⁴ *See Brief for the United States* at 12-14. As a result, they argue that the Supremacy Clause dictates the result in this case: a finding that Congress may validly abrogate state sovereign immunity under the Commerce Clause to enforce the FLSA. That is, because this Court held in *Garcia* that the application of the FLSA to the states implicated no federalism concerns, the Supremacy Clause dictates that, following *Garcia*, the enforcement of the FLSA through the creation of a private right of action against the states in state courts similarly raises no federalism concerns. Because of *Garcia*, Petitioners apparently believe that the FLSA is simply the supreme law of the land.

⁴ Congress may provide other remedies besides a private right of action. In *Seminole Tribe*, this Court identified three methods of enforcing federal laws against the States: a suit by the federal government against the state, a suit brought against a state official under *Ex Parte Young*, or state consent to suit. *Seminole Tribe*, 517 U.S. at 71 n.14. In addition to a private right of action, the FLSA provides for enforcement actions by the Secretary of Labor against a State. *See* 29 U.S.C. §§ 216(b), (c), and 217.

But the Supremacy Clause does not require this Court to follow *Garcia* to that degree. That it would undermine *Garcia* if this Court were to hold that Congress may not create a private right of action against the states is an argument that is well-taken. But it ignores the counterargument that perhaps *Garcia* should be undermined, at least to that extent. The only alternative route presented by this case is to expand upon *Garcia* to a significant degree. *Garcia* found that Congress could create state fiscal obligations by requiring states to comply with the FLSA. But finding a congressional power under the Commerce Clause to unilaterally abrogate sovereign immunity is a *different* power than the considerable power already upheld in *Garcia*. The power to apply the law and the power to require enforcement by a particular means are not necessarily equal or concurrent. Thus, reliance upon the Supremacy Clause for resolving this case reaches too far. It only begs the issue, because the operation of the Supremacy Clause depends wholly upon a finding that the exercised power is, in the first instance, within Congress' grasp.

Though it is possible to resolve this case without disturbing *Garcia*'s ultimate determination that the FLSA may be applied to the states, it is not clear this Court can proceed without disturbing *Garcia*'s broad rationale. For example, this Court has already rejected the notion that Congress may employ any means to enforce a federal law, so long as its end is legitimately within its powers. In *New York v. United States*, this Court held that Congress may not regulate interstate radioactive waste by forcing the state legislative branch to legislate in a certain way or, alternatively, take title to waste generated within its borders. *New York v. United States*, 505 U.S. 144, 175-76 (1992). And in *Printz v. United States*, this Court held that the federal government may not conscript state executive officials into carrying out a federal regulatory program. *Printz*, 117 S. Ct. at 2384. These cases stand for the proposition that there exist some aspects of state independence and autonomy with which the federal government may not interfere.

However, the Petitioners argue that the matter at issue here, sovereign immunity, does not bear any constitutional weight in light of Congress' vast Commerce Clause powers, as defined by *Garcia*.⁵ *Garcia* discarded the test created in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress may not regulate the "states as states," *see id.* at 854, largely on the basis that courts could not discern what properly fell into the sphere of "traditional government functions" or "matters that are indisputably 'attribute[s] of state sovereignty.'" *Garcia*, 469 U.S. at 548 (citations omitted). Although that argument may have had some merit with respect to transportation or water services (*see id.* at 542), it is certainly not the case with sovereign immunity. But *Garcia* seemed to reject completely the idea that courts "ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States." *Id.* at 548. Instead, *Garcia* announced:

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the

⁵ Contrary to Petitioners' argument *Hilton* does not resolve this issue. Justice Kennedy's opinion repeatedly emphasized that the issue before the Court was "a pure question of statutory construction," not constitutional law. *Hilton*, 502 U.S. at 205. His opinion had this to say regarding state immunity in state court:

The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument. Symmetry in the law is more than esthetics. It is predictability and order.

Id. at 206.

Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554. This Court seemed to say that the only protection afforded to a state was the state's membership in the union, and its representation in the legislative branch of the federal government. In short, strict adherence to *Garcia* leaves states in no better position with respect to the federal government than a private citizen, whose remedy for defects in government policy lies only in the political arena.

But the states do "occupy a special position in our constitutional system," *id.* at 547, as recognized by this Court in *New York* and *Printz*. Here, there is no question that sovereign immunity is something this Court, and any court, can discern as an "underlying element[] of political sovereignty that [is] deemed essential to the States' 'separate and independent existence.'" *Garcia*, 469 U.S. at 548. To the extent that *Garcia* suggests that no attribute of sovereignty is "fundamental," *id.*, or beyond the power of this Court to protect, it should be overruled.

This Court has recognized the respect the federal government must pay toward the state courts and the application of state law principles within state courts under our federal system:

The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States--independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or judicial action of the States is in no case permissible

except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the States and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). Respect for the position of the states inheres in this Court's decisions, whether in the application of the *Erie* doctrine or in finding substantive limitations on federal power in *New York* and *Printz*. But the federalism-related implications of the present case go beyond these precedents. The federalism implications of this case are compounded, because the Petitioners are seeking to decimate an essential attribute that characterizes a state as a sovereign: sovereign immunity.

The United States downplays the federalism implications of this case by arguing that exclusive state jurisdiction over claims against the states "furthers the State's interest in playing a role in defining the contours of federal law and in integrating federal and state law into a single body of law governing the conduct of state officials." *Brief for the United States* at 12. The first error in this argument is that the State of Maine has already indicated that it has *no* interest in this role; therefore, there can be no furthering of it's interests by abrogating its immunity. The second is that this reasoning--that states will decide the meaning of federal law--fairly thwarts the very purpose of federal law: national uniformity. But finally, and most importantly, the United States concedes that finding a power to abrogate will blur the lines between state and federal law. Since federalism maintains separation between state and federal governments for the purpose of preserving individual freedom, *see generally, Gregory v. Ashcroft*, 501 U.S. at 458-59, "integrating" the two can hardly be characterized as a virtue. Thus, even though the United States tries to paint its argument in a positive light, they cannot ignore the broader implications of what they are asking. Finding a power to abrogate will lead to

even greater inroads into state sovereign interests--and individual liberty--than already exist under *Garcia*. This Court should resist taking such a step.

This Court should expressly disavow *Garcia*'s undue deference to trusting the political processes to protect state sovereignty. This Court has an affirmative role in protecting the independence of the states. As noted by Hamilton:

It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

Alexander Hamilton, *The Federalist* No. 78 at 396. In particular, it is this Court's duty "to declare all acts contrary to the manifest tenor of the constitution void." *Id.* at 395. While, as stated above, this Court need not overrule *Garcia*'s holding that the FLSA may be applied to the states, this Court should expressly disavow its rationale to the extent that it suggests that there are no fundamental attributes of sovereignty which this Court cannot affirmatively protect from federal encroachment. State sovereign immunity is an attribute of state sovereignty that requires this Court's protection from congressional overreaching.

CONCLUSION

This Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority* upheld Congress' application of the Fair Labor Standards Act to state governments. In this case, the Petitioners and the United States are asking this Court to go further than *Garcia*, and hold that Congress has the authority under the Commerce Clause to override state sovereign immunity by allowing the FLSA to be

enforced by a private right of action against the states in state courts. But this is contrary to fundamental notions of federalism and state sovereign immunity.

In the decision below, the Supreme Judicial Court of Maine held that Congress lacked this power. This Court should affirm the decision of the Maine Court and hold that the constitutional principle of federalism denies Congress the power to abrogate state sovereign immunity in state courts.

DATED: February, 1999.

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